TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 322

PETE LURETICH, AN INDIVIDUAL DOING BUSINESS AS PACIFIC REFRIGERATED MOTOR LINE, APPELLANT,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

FILED JULY 30, 1941.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 25, 1941.

[fols. 1-2] [File endorsement omitted]

[fol. 3]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

No. 314

PETE LUBETICH, an Individual, Doing Business as Pacific Refrigerated Motor Line, Plaintiff,

vs.

THE UNITED STATES OF AMERICA, Defendant

COMPLAINT—Filed January 8, 1941

To the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division:

Comes now the above named plaintiff, and for his cause of suit against the defendant Alleges and Shows:

I

That plaintiff, Pete Lubetich, was and is an individual duly authorized to do business under and by virtue of the laws of the State of Washington as Pacific Refrigerated Motor Line with his principal place of business in Seattle, Washington; that said plaintiff and his predecessors in interest since prior to June 1, 1935, have been and are lawfully engaged in the business of transporting property for hire in interstate commerce as a common carrier of general commodities by motor vehicle between various points and places in the States of Washington, Oregon and California, and among other places, between Seattle, Washington, and Los Angeles, California; that said plaintiff is subject to regulation by the Interstate Commerce Commission.

II

That this suit is brought against the United States of America under an act of Congress approved October 22, 1913, known as the "Urgent Deficiencies Appropriations Act," 38 Stat. L. 219, to enjoin, set aside and annul [fol. 4] that certain order entered by the Interstate Com-

merce Commission (hereinafter called the Commission) on July 2, 1940, effective August 20, 1940 (and thereafter several times amended through and including an order of the Commission of December 31, 1940, extending the effective date of the order to January 10, 1941), in its proceeding known as "MC 34383, Pete Lubetich Common Carrier Application"; that a copy of said order of July 2, 1940, is appended hereto as Exhibit A; and that a copy of said last order of December 31, 1940, is appended hereto as Exhibit B.

III

That pursuant to the provisions of the Motor Carrier Act of 1935, as amended (Title II of the Transportation Act of 1940, 49 U. S. C.), and prior to February 12, 1936, plaintiff filed with the Commission his application under the so-called "grandfather" clause for a certificate of public convenience and necessity authorizing transportation of commodities generally between points and places in the States of Washington, Oregon and California; that said application was filed on Form BMC 1, which form was designated by the Commission to be used by common carriers claiming rights under the "grandfather" clause provisions of Section 206 of the above entitled act; that thereafter on October 16, 1937, the Commission issued its order, a copy of which is attached as Exhibit C, granting to plaintiff a certificate to transport general commodities between Seattle, Washington, and Los Angeles, California, serving certain designated intermediate and off-route points; that thereafter on November 13, 1937, upon petition of plaintiff the Commission issued a further order, a copy of which is attached as Exhibit D, which stayed the effect of the order set forth as Exhibit C; that thereafter on September 29 and September [fol. 5] 30, 1938, the Commission conducted a formal hearing on the application, and on August 25, 1939, a Joint Board of the Commission issued a report recommending denial of the application; that exceptions were duly filed by the plaintiff to this order, and on July 2, 1940, the Commission issued its order, hereinabove designated as Exhibit A, which denied said application, effective August 20, 1940.

IV

That meanwhile, on or about September 15, 1939, pursuant to the provisions of Section 206 (a) and 207 (a) of the

Motor Carrier Act, 1935, plaintiff filed an application for a certificate of public convenience and necessity on Form BMC 8, which form was designated by the Commission to be used by a common carrier seeking a certificate to continue operations or to institute new operations, other than claimed under the "grandfather" clause, to-wit: upon a showing of public convenience and necessity.

V

That said further public convenience and necessity application was designated by the Commission as its Docket No. MC 34383 (Sub. No. 1), and was dully assigned for hearing, and heard, by a Joint Board of the Commission at Seattle, Washington, on January 30 to February 2, 1940, and at Los Angeles, California, on March 19 and 20, 1940; that briefs were due and seasonably filed by all parties on May 10, 1940; that from that date up to and including the present time, no report or order has been issued by the Joint Board or by the Commission determining said application for a certificate of public convenience and necessity.

VI

That when the Commission's order under the "grand-
[fol. 6] father" clause in MC 34383 (which by its terms ordered a denial of the "grandfather" application effective August 20, 1940), was served on plaintiff, plaintiff duly petitioned the Commission to grant an extension of time of the effective date alleging that plaintiff would otherwise be irreparably injured if he was required to abandon his operations prior to determination of his pending application for a certificate of public convenience and necessity; that the Commission did grant such extension as prayed for a period of approximately sixty days to October 12, 1940; that prior to October 12, 1940, the Commission had not yet issued its report and order in the still pending application for a certificate of public convenience and necessity, and that therefore plaintiff again sought an extension of the effective date of the pending "grandfather" clause application, alleging that it would otherwise cause irreparable damage to plaintiff and that on October 11, 1940, the Commission granted a further sixty-day extension to December 12, 1940; that on December 12, 1940, no report had yet been issued by the Joint Board or by the Interstate

Commerce Commission in the pending application for a certificate of public convenience and necessity, but that on November 14, 1940, the Commission issued its order extending the effective date of the "grandfather" application to January 4, 1941; that on December 17, 1940, the plaintiff filed a petition again, alleging that as a matter of law and equity, it would suffer irreparable damage unless the Commission extended the effective date of its order until such time as there was a final determination of the still pending and undetermined application for a certificate of public convenience and necessity; that on December 31, 1940, the Commission extended the effective date to January 10, 1941; that on January 6, 1941, the Commission [fol. 7] advised plaintiff by telegram as follows:

"Commission has denied further postponement in MC 34383 and denial order is effective January 10. Any request for further postponement pending court proceeding will be considered only if made by Federal Judge."

A true copy of this telegram is attached as Exhibit E.

VII

That if said order of the Interstate Commerce Commission of December 31, 1940, becomes effective January 10, 1941, plaintiff will be required to discontinue operations conducted since prior to June, 1935, as a common carrier of general commodities by motor vehicle in interstate commerce between points in Washington, Oregon and California, notwithstanding the fact that there is still pending and undetermined before the Commission an application for a certificate of public convenience and necessity wherein plaintiff introduced extensive proof of the existence of such public convenience and necessity over the same routes and within the same territory; that the required discontinuance of his operations will result in irreparable damage to plaintiff even though subsequently at an indeterminate date the Commission should permit him to resume operations upon a finding of public convenience and necessity; that such irreparable damage will result through the loss of customers, the depreciation and decay of extensive motor vehicle equipment, the alternative choice of maintaining offices and terminals during a period of required inactivity, or alternately to continue to pay rent and other obligations while failing to use such terminals, and other damage.

VIII

The plaintiff avers and charges that said order of the Commission of December 31, 1940, denying to the plaintiff the right to continue to render services between the points named in said order was and is unreasonable, arbitrary, [fol. 8] and capricious, and was made and entered by the Commission arbitrarily and under misconceptions of law and is null and void and should be set aside for the following reasons:

(1) That the order is contrary to the law and the evidence;

(2) That the Commission erred and acted beyond the scope of its authority in making effective a final denial of an application under the "grandfather" clause which denies the plaintiff the right to continue long established operations while there is still pending on a record fully made a concurrent application wherein there has been offered all of the evidence of public and private interest that is implicit in an application based on public convenience and necessity;

(3) That the Commission misconceived its statutory powers and exceeded its jurisdiction and authority in proceeding to deny said application upon the sole theory of "grandfather" rights when plaintiff has made a claim before the Commission to have the Commission act outside the "grandfather" clause and determine the issue of public convenience and necessity.

IX

That if said order of the Commission herein complained of is permitted to become effective, it will cause the plaintiff grave and irreparable injury and damage of the nature hereinbefore and hereinafter set forth; that as further specific grounds for the issuance of a preliminary or interlocutory injunction against the enforcement of said order pending the determination of the merits of this cause and as further grounds for granting a permanent injunction herein, plaintiff alleges and shows in addition to the facts above shown the following:

(1) Said order of the Commission, modified as aforesaid to its present effective date of January 10, 1941, ex- [fol. 9] pressly denies plaintiff's application under the "grandfather" clause. This denial will require plaintiff

to discontinue his operations. If plaintiff refuses to compiy with said order of the Commission, such refusal will constitute a violation of Section 222 of the Motor Carrier Act, 1935, and will subject plaintiff to statutory penalties of $100.00 for the first offense and not more than $500.00 for any subsequent offense, each day of such violation being deemed a separate offense, and will expose plaintiff to separate actions by the United States for the recovery of said accruing penalties.

(2) The plaintiff has no plain, adequate, or complete remedy at law in the premises.

Wherefore, Plaintiff prays as follows:

(1) That this Court issue herein a preliminary or interlocutory injunction suspending and restraining the enforcement, operation and execution of said order of the Commission entered July 2, 1940 (as modified to become effective January 10, 1941), (copies of which are attached as Exhibits A and B of this complaint), insofar as same requires plaintiff to cease his operations as a common carrier by motor vehicle of general commodities in interstate commerce between points in Washington, Oregon and California, and that defendant, its officers and agents, be enjoined and restrained from enforcing or attempting to enforce said order pending the final determination of this cause.

(2) That upon final hearing a decree be entered setting aside and annulling and perpetually enjoining the enforcement of said order of the Commission so entered in MC Docket No. 34383, so far as same requires plaintiff to discontinue his operations as a common carrier by motor vehicle of general commodities in interstate commerce [fol. 10] between points in Washington, Oregon and California, and by such decree defendant, its officers and agents, be perpetually enjoined and restrained from enforcing or attemping to enforce said order.

(3) That plaintiff have such other and further relief as the nature of the case shall require and to this Court shall seem meet.

Albert E. Stephan, Northern Life Tower, Seattle, Washington, Attorney for Plaintiff.

[fol. 11] *Duly sworn to by Pete Lubetich. Jurat omitted in printing.*

[fol. 12] EXHIBIT A TO COMPLAINT

Interstate Commerce Commission

No. MC-68618 [1]

Los Angeles-Seattle Motor Express, Inc., Common Carrier Application

Submitted October 16, 1939. Decided July 2, 1940

1. Applicant in No. MC-68618, as successor in interest to Marie Hernych and J. J. Hendricks, found entitled to continue operations as a common carrier by motor vehicle of (a) general commodities, with exceptions, between Los Angeles, Calif., and Seattle, Wash., over regular routes, serving certain intermediate and off-route points; and (b) special commodities, between points in California and Washington, over irregular routes, because its predecessors were engaged in such operations on June 1, 1935, and it, or its predecessors, have been so engaged continuously since. Issuance of a certificate approved upon compliance with certain conditions, and application denied in all other respects.

2. Applicant in No. MC-34383, as successor in interest to Pete and John Lubetich, and applicant in No. MC-8522, as successor in interest to I. A. Taylor and A. Fornaciari, found not entitled under the "grandfather" clauses of sections 206 (a) and 209 (a) of the Motor Carrier Act, 1935, to a certificate of public convenience and necessity, or a permit, authorizing operation as a common carrier, or contract carrier, by motor vehicle, of general commodities, between points in California, Oregon, and Washington, over regular or irregular routes. Applications denied.

Henry T. Ivers for applicant in No. MC-68618.

E. K. Marohn and H. D. Williams for applicant in No. MC-34383.

E. N. Eisenhower and Chas. D. Hunter, Jr. for applicant in No. MC-8522.

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[1] This report also embraces No. MC-34383, Pete Lubetich Common Carrier Application, and No. MC-8522, Williams Brothers, Inc., Common Carrier Application.

William B. Adams, Edward M. Berol, A. J. Clynch, Alfred A. Hampson, E. K. Marohn, Edwin C. Matthias, Richard B. Maxwell, Donald A. Schafer, and E. V. White, for protestants in No. MC-68618.

William B. Adams, R. H. Culbertson, A. A. Hampson, Henry T. Ivers, Thos. Maguire, Frank C. McColloch, and Donald A. Schafer for protestants in No. MC-34383.

William B. Adams, A. A. Hampson, Henry T. Ivers, Emmett G. Lenihan, Thos. Maguire, Frank C. McCulloch, and Donald A. Schafer for protestants, in No. MC-8522.

[fol. 13] Report of the Commission

Division 5, Commissioners Lee, Rogers, and Patterson

By Division 5:

The three applications herein considered were heard separately and each was the subject of a separate recommended report and order by joint board No. 5. For reasons which are apparent from our discussion herein, these three applications will be discussed separately but disposed of in one report. Exceptions were filed by each of the applicants to the orders recommended by the joint board in their respective cases and protestants replied. Our conclusions differ somewhat from those recommended in No. MC-68618.

Applicant in No. MC-68618 opposed the other two applications and in turn its application was opposed by the other two applicants herein. In addition, numerous rail and motor carriers oppose all three applications.

No. MC-68618

By application filed February 11, 1936, under the "grandfather" clause of section 206(a) of the Motor Carrier Act, 1935, the Los Angeles-Seattle Motor Express, Inc.,[2] of Seattle, Wash. as successor in interest to Marie Hernych

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[2] Substitution of Hendricks Refrigerated Truck Lines, Inc., as applicant in lieu of Marie Hernych and J. J. Hendricks was authorized May 18, 1937, in No. MC-FC 1430. On July 1, 1938, applicant's name was changed to Los Angeles-Seattle Motor Express, Inc.

and J. J. Hendricks, co-partners, seeks a certificate of public convenience and necessity authorizing continuance of operation as a common carrier by motor vehicle of general commodities, except explosives, in interstate or foreign commerce, between points in California, Oregon, and Washington, over irregular routes, and also over a number of regular routes, which, in view of our conclusions herein, need not all be described.

[fol. 14] The operations to which applicant succeeded were begun in December 1932 by J. J. Hendricks and his sister, Marie Hernych, and were continued by them on a partnership basis until January 1937. At that time the operations were taken over by Hendricks Refrigerated Truck Lines, a corporation formed for that purpose by Hendricks and his sister, and the name of which, on July 1, 1938, was changed to that which it now bears—the Los Angeles-Seattle Motor Express, Inc. Applicant's predecessors were registered on May 4, 1935, under the N. R. A. Code of Fair Competition. Terminal facilities have been maintained at Los Angeles, Calif., and Seattle since the inception of the operations, and also, prior to June 1, 1935, at Portland and Medford, Oreg.

While applicant's and its predecessors' operations have been conducted in equipment both owned and leased, applicant voluntarily submitted proof only of those operations which have been performed solely in equipment of which it or its predecessors have been the owners.

Applicant's evidence describes movements allegedly representative of a total of some 18,000 shipments. Included among them are shipments described as "express", which consisted of commodities falling within the category of general merchandise, such as brass goods, stationery and office supplies, auto supplies, hardware, radios, furniture, woolens, advertising matter, etc. These express shipments were handled under an arrangement with one R. W. Lacey, who operated as the Los Angeles-Seattle Motor Express but who has since discontinued his operations [3] and is now both a stockholder in, and an employee of, applicant. The [fol. 15] arrangement with Lacey, which on March 27, 1936, was reduced to writing, provided in substance that on cer-

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[3] The application of R. W. Lacey—No. MC-30103—for appropriate authority under the act was dismissed at his request on April 11, 1939.

tain days each week Lacey would deliver to applicant, or its predecessors, as the case might be, express matter in minimum lots aggregating not less than 4,000 pounds. Applicant and its predecessors transported this traffic from origin to destination, and agreed not to enter into any similar agreement directly or indirectly with any other person, firm, or corporation operating as a common carrier and publishing rates lower than those of Lacey. The express was handled under so-called master bills of lading, which were accompanied by expense bills covering each individual item in the shipments, as well as by an abstract of the expense bills. The expense bills were turned over to a distributing agent at the destination point.

Lacey had no motor carrier equipment with which to perform a transportation service; was not shown to have exercised control over applicant or its predecessors in respect to the performance of the physical transportation; and paid applicant or its predecessors their established charges for the transportation performed. Definitely, therefore, he was not a common carrier by motor vehicle within the purview of the act—Acme Fast Freight, Inc., Common Carrier Application, 8 M. C. C. 211. Insofar as the agreement itself is concerned, there was nothing in it circumscribing applicant's or its predecessors' operations as independent carriers. Lacey's position in relation to them was simply that of a shipper. The mere existence of the written agreement did not constitute applicant or its predecessors contract carriers for, of course, all transportation is performed under agreements, written or oral. Patman Contract Carrier Application, 2 M. C. C. 194. It [fol. 16] is our conclusion, therefore, that the benefit of the transportation of the express items inure entirely to applicant, and such items should be viewed in the same light as any other commodities transported by applicant for other shippers.

Applicant's and its predecessors' transportation between Seattle and Los Angeles has been continuous since before June 1, 1935. Although the commodities carried southbound were not as varied as were those transported northbound, applicant contends that the joint board erred in finding that it should be restricted on its southbound movements to special commodities only. Protestants, on the other hand, contend that the finding of the joint board is correct.

The base load southbound was, and apparently still is, commodities requiring refrigeration, principally fish and fruits. However, applicant's predecessors also transported southbound, on or prior to June 1, 1935, one or more shipments of honey, chocolate, files, paper, express, poultry, woolens, powdered yolks, fish sausage, cut flowers, egg whites, truck cab, butter, and tubing, which commodities bear little or no relation to fish and fruits.

In Reliance Trucking Co., Inc., Contract Carrier Application, 4 M. C. C. 594, division 5 stated:

Nor do we require proof, in granting "grandfather" certificates to haul "general commodities", that each and every commodity within that description has actually been carried. The question is whether there has been operation within the "grandfather" period consistent with the holding out of the natural and normal course of business. A mere holding out without evidence of the operation consistent therewith is not enough.

Applicant's claim that its predecessors held themselves out to transport general commodities is corroborated by the fact that they undoubtedly did transport general com- [fol. 17] modities, with certain exceptions hereinafter discussed, northbound, to which recommendation of the joint board protestants filed no exceptions, and also by the fact that they did transport southbound a number of commodities in addition to fish and fruits. However, the application itself excludes explosives and there is no showing that applicant or its predecessors ever transported certain commodities of a highly specialized nature, i.e., those of unusual value, commodities in bulk, household goods (when transported as a separate and distinct service in connection with so-called "household movings"), and commodities requiring special equipment other than refrigeration. Considering the operation as a whole, there was clearly no limitation or restriction in the undertaking to transport, except as above described, in respect of the regular route operations, on June 1, 1935, and we see no reason for limiting the authority herein to special commodities in either direction.

In 1935 prior to June 1, in addition to those made from Seattle to Los Angeles, shipments were also made from Seattle to other California points, as follows: to San

Pedro in January, February, March, April, and May; to Long Beach during each month from January through May; to Hollywood in February, April, and May; to Fresno in January, February, and March; Sacramento in January, February, March, April, and May; Chico in January and May; Stockton in January, February, March, and May; Glendale in February and May; Redding in March; Terminal Island and Santa Monica in February; and to Wilmington in May. All of these points are located in the vicinity of Los Angeles or on the routes described in the appendix hereto. By reason of its showing in respect of movements to those points in California located on the routes in question, applicant is entitled to serve from [fol. 18] Seattle all intermediate points in California, as well as those described above which are not on the routes but fall within the category of off-route points. Compare Knaus Common Carrier Application, 20 M. C. C. 669, 671.

San Diego, Calif., is situated too far distant from Los Angeles to be termed an off-route point, System Arizona Exp. Service, Inc., Com. Car Application, 4 M.C.C. 129, 131. Therefore, the two shipments shown to it, one in January and the other in April, are insufficient to establish any right in applicant to operate to that point from Seattle. Only two movements are shown from Seattle to San Francisco, Calif.,—one of poultry in January and the other of butter in May. Considering the size of that city, applicant should have been able to show more movements to it than it has done, and accordingly it cannot be found entitled to serve San Francisco from Seattle, nor to operate over routes from Seattle to Los Angeles other than over those designated in the appendix.

Infrequent movements were also made from Portland, a shipment of auto parts moving to San Francisco in January, a shipment of a motor to Los Angeles in February, and a shipment of express to Los Angeles and of oysters to San Francisco in March. Considering the size of Portland, applicant's showing is insufficient to entitle it to any "grandfather" rights from that point. Aside from Portland, the only other point in Oregon from which movements originated prior to June 1, 1935, was Salem, and that involved but one movement.

Applicant's northbound traffic has moved principally from Los Angeles to Seattle, and prior to June 1, 1935, involved mainly shipments of express, although various

other commodities also were handled. Several shipments [fol. 19] moved in January, February, and March. In addition to movements to Seattle, several shipments of express were also made in January, March, and May, and one of advertising matter in May, from Los Angeles to Medford. Several shipments of express were handled to Portland in January, February, March, and May, and one of merchandise in January. Aside from these points, service from Los Angeles to other points in Oregon and Washington has been limited, other than in respect of fruits and vegetables, which will subsequently be discussed. Applicant will be authorized to transport general commodities, with certain exceptions, from Los Angeles to Seattle, Medford, and Portland, over the routes described in the appendix.

Shipments of fruits and vegetables emanated from numerous points in southern California and there is oral testimony that such shipments originated as far north as Merced. The shipments in question were destined to Seattle, Tacoma, Centralia, Olympia, Spokane, Bellingham, Aberdeen, and other points in Washington. Applicant, however, does not hold itself out to transport shipments to those points in Washington east of the Cascade Mountains, in lots of less than 10,000 pounds. Other than from Los Angeles to Portland no shipments of fruits or vegetables are shown on or prior to June 1, 1935, to any points in Oregon, except one of oranges to Salem. Applicant is entitled to continue the transportation of fruits and vegetables from points within the described area in California to points in Washington, over irregular routes.

Southbound movements, from Washington, of fruit or vegetables are shown from Spokane to Whittier, Calif., in May; from Yakima to Los Angeles in January and April; from Dryden to Los Angeles in January; and from Wenatchee to Los Angeles in February and May 1935. Applicant [fol. 20] is entitled to continue this transportation, over irregular routes, from points in Washington located in the area bounded on the north by U. S. Highway from the Washington-Idaho State line to Dryden, and on the west by U. S. Highway 97 from Dryden to the Washington-Oregon State line, including points located on such highways, to points in California located south of Merced.

In its exceptions applicant contends that the joint board erred in not recommending a much broader grant of au-

thority but did not point out in any particular respect wherein it erred. We have reviewed the record herein and our conclusions are set forth above. Applicant does contend, however, that what it did in October or November 1935 is equally as important as what it did in February and March 1935 and on June 1, 1935. This is not entirely correct. We must first determine what operations an applicant was conducting on June 1, 1935, and in respect of this date it is necessary to base our conclusions on the operations conducted during a reasonable period prior thereto. Operations conducted after June 1, 1935, are important, but only to show that applicant has continued the operations which it was conducting on the statutory date. There is no doubt herein of the continuity of applicant's operations. Applicant's further contention that the evidence in this record would sustain a showing of public convenience and necessity for its service as it was being rendered on the date of the hearing, even if true, could not be considered by us on this record which involves "grandfather" rights only. Fisher Common Carrier Application, 17 M.C.C. 565 and 20 M.C.C. 561. In this connection it is noted that applicant filed a BMC 8 application covering this same territory, which application was the subject of a recent hearing.

[fol. 21] No. MC-34383

By application, filed February 5, 1936, under the "grandfather" clauses of sections 206(a) and 209(a) of the act, Pete Lubetich[1], of Seattle, doing business as Pacific Refrigerated Motor Line, seeks a certificate of public convenience and necessity authorizing continuance of operation as a common carrier by motor vehicle, or in the alternative, a permit as a contract carrier by motor vehicle, of general commodities, in interstate or foreign commerce, between points in California, Oregon, and Washington, over irregular routes, and also over certain regular routes, which, in view of our conclusions herein, need not be described.

The operations which applicant seeks authority to continue were commenced on March 15, 1935, and were con-

[1]Substitution of Pete Lubetich, doing business as Pacific Refrigerated Motor Line, as applicant in lieu of John and Pete Lubetich was authorized June 5, 1937, in No. MC-FC 1709.

ducted over a regular route between Los Angeles and Seattle, and also over certain irregular routes. Between June 1935 and January 1938, most, if not all, of the traffic handled by applicant or his predecessors was solicited and billed by other motor carriers, and was transported in applicant's vehicles only between the terminals of the other carriers. In January 1938, applicant engaged a solicitor of his own, established terminals, and apparently discontinued the operations previously conducted in connection with these other carriers. He now operates eight pieces of equipment, only two of which he owns. Before discussing the question as to whether applicant is entitled to any rights by reason of the operation conducted prior to January 1938, two other questions, pertaining to the opera- [fol. 22] tion, require mention.

The first is whether an interruption in his predecessors' operations, which occurred and lasted during the period from October 22, 1935, either to December 24, 1935, or January 28, 1936—the final date being uncertain—was within the latter's control. While determination of this question is rendered unnecessary by our subsequent conclusion herein, it is pertinent to describe the circumstances surrounding the interruption. Applicant's predecessors purchased a truck in January 1935, and sometime thereafter it developed certain defects, which, while rendering it unsatisfactory, did not prevent its continued use. Being unable to reach an agreement with the vendor looking toward the replacement of the truck, the predecessors attempted to force an understanding by withholding payment of the final installment due on the purchase price, although they had the money with which to meet that obligation. The vendor thereupon repossessed the truck, with the consequent interruption in operations during the period specified. Applicant contends that this interruption was one over which the predecessors had no control, and that they had no intention to cease operation as evidenced by the fact that on October 31, 1935, they made a down payment on a new truck.

The other question presented relates to the bona fides of the operation. Applicant's predecessors were John and his father Pete Lubetich. Operations were conducted on a "family basis" and allegedly as co-partners. The first authority received by them from the State of Oregon, and

which was later canceled, was issued on March 16, 1935, in the name of John Lubetich. Upon cancellation or suspension of this authority, it was necessary that new authority [fol. 23] from the State be sought in the name of Pete, for renewal in the name of John was rendered impossible by reason of the past operating fees owed the State by them in John's name. Pete accordingly applied for authority in his name only, omitting to inform the State that the operation for which the authority was sought was actually the same in which he and John had previously been authorized to engage, or that it was being conducted on a partnership or family basis. Thus was new authority for the operation secured, and at the same time payment of the past fees owing in the name of John avoided.

The joint board to which the application was referred, for hearing and the recommendation of an appropriate order thereon, found that applicant was not entitled to the certificate sought because of the manner, above-described, in which John and Pete Lubetich, applicant's predecessors, dealt with the Oregon authorities. The joint board stated that such operations were not bona fide and recommended that the application be denied. Applicant excepted generally to such finding. Protestants in their reply to the exceptions contend that the finding of the joint board is correct. A determination of this question as to the bona fides of the operation is also rendered unnecessary by our subsequent conclusion herein. Therefore, we will assume, without deciding, that the facts with respect to the issuance of the Oregon permit would not be of such a character, in and of themselves, as to defeat the authority sought.

As hereinbefore stated, most, if not all, of the traffic handled by applicant or his predecessors was solicited and billed by other motor carriers. Prior to January 1938, applicant operated two trucks. In support of his request for rights under the "grandfather" clause of the act, appli- [fol. 24] cant submitted an exhibit listing shipments transported by him or his predecessors beginning on March 16, 1935, and extending to the date of the hearing. Hendricks Refrigerated Truck Lines, Inc. (hereinafter called Hendricks), the operations of which are described above under No. MC-68618, contends that applicant and his predecessors were merely so-called owner-drivers for it and that applicant did not commence an operation in his own name until January 1938.

A witness for Hendricks testified that he was familiar with applicant's operations for Hendricks; that he had present at the hearing the manifests showing the numbers of the trucks, the original bill of lading showing consignor and consignee, and the delivery receipt for the merchandise tonnage; that applicant made no trips other than those routed out of its (Hendricks) office; and that the manifests cover the complete loads transported on applicant's equipment.

During the period from April 1937 until January 1938, at least, every shipment listed in applicant's exhibit purporting to prove operations was transported by applicant for Hendricks. In such instances the bills of lading were issued by Hendricks, and Hendricks employed applicant to transport the goods. On southbound loads applicant was credited with the total revenue less 10 percent; and on northbound fruit and produce transported he was credited with the total revenue, while on certain traffic called "express" (explained in our discussion under No. MC-68618) he was paid a flat rate of 80 cents per hundred pounds. The tariff rates applied were those of Hendricks. Applicant or his predecessors also sent Hendricks telegrams requesting loading instructions or reporting loadings. With respect to settlement of claims with shippers, [fol. 25] the general practice was for Hendricks to pay the claim, although the amount was later deducted from that paid applicant.

From August 5, 1937, to September 18, 1937, both of the Lubetichs were either fishing or buying fish for a certain fish company. During this period operations were conducted with one truck. On at least one trip, applicant's driver was supplied with Hendricks' requisitions for the purchase of gasoline and Hendricks gave applicant's driver checks in small amounts to pay his expenses from Seattle to Los Angeles. These advances and cost of gasoline were later deducted from the settlement made by Hendricks to applicant.

Although applicant contends that he made some trips in which he did not have freight loaded by Hendricks, he submitted no documentary evidence to support this contention, and, in fact, the evidence shows that at least during the period from April 1937 until January 1938, the only freight transported in applicant's equipment was for Hendricks, a common carrier by motor vehicle. During the period in

question applicant and his predecessors apparently held permits from the States of California, Washington, and Oregon, and, at least, paid a monthly fee to the latter State based upon the total number of miles operated therein. The 1937 license issued by the Board of Equalization of California reads: "Pete Lubetich * * * C/o J. J. Hendricks, Los Angeles".

The facts in this case are similar to those discussed in B-Line Motor Freight Common Carrier Application, 20 M.C.C. 538, wherein we stated that such service was not the fulfillment of engagements in consequence of a holding out to the general public, but primarily was the hauling of traffic for motor common carriers, and concluded:

[fol. 26] During the period of such operations he in effect abandoned for the time his own operations as a common carrier and assumed the position of an owner-operator. Such operations do not entitle him to the certificate sought. See Dixie Ohio Exp. Co. Common Carrier Application, 17 M.C.C.735.

As this same situation is present in the instant case, like findings should be made.

The record contains certain contradictory evidence having a bearing upon whether Hendricks was in fact operating as a broker during the period in question and also as to whether the name of applicant or his predecessor was carried on their respective pieces of equipment. However, these questions are not controlling in view of the facts discussed above and need not be given further consideration herein.

No. MC-8522

By application [5], No. MC-8522, filed February 7, 1936, A. Fornaciari, of Seattle, sought a certificate of public convenience and necessity authorizing continuance of operation as a common carrier by motor vehicle, or in the alternative, a permit as a contract carrier by motor vehicle, of general commodities, with certain exceptions, in interstate or foreign commerce, between points in California,

[5] Under the "grandfather" clauses of sections 206(a) and 209(a) of the act.

Oregon, and Washington, over irregular routes. By application [5], No. MC-33581, filed February 7, 1936, I. A. Taylor, of Seattle, doing business as American Motor Freight Co., also sought a certificate of public convenience and necessity authorizing continuance of operation as a common carrier by motor vehicle, or in the alternative, a permit as a contract carrier by motor vehicle, of general commodities, with certain exceptions, in interstate or foreign commerce, between points in California, Oregon, and Washington, over irregular routes. Division 5, on September 17, 1936, in No. [fol. 27] MC-FC 177, approved the substitution of Williams Brothers, Inc., of Tacoma, Wash., as applicant in lieu of I. A. Taylor; and also, on June 7, 1937, in No. MC-FC 1831, in lieu of A. Fornaciari. The application originally filed by Taylor has since been consolidated with that of Fornaciari, and the two now bear the docket number of the latter, No. MC-8522. The term "applicant", as hereinafter used, will refer to the present applicant, Williams Brothers, Inc.

Taylor's operations. These operations, which were conducted under several different trade names, were commenced in 1932, and involved the solicitation from the general public of traffic on behalf of various motor carriers, including Fornaciari and Lubetich. Taylor received from these carriers compensation in the form of commissions on the traffic thus secured. The only actual motor transportation Taylor himself performed with equipment of which he was the owner, aside from two or three trips between Seattle and Los Angeles in July and August 1935, was conducted between Denver, Colo., and Seattle [6].

There is nothing in the record of this proceeding to indicate that the operations of Taylor as of June 1, 1935, were other than, at most, those of a broker as defined in section 211 of the act. There is no contention on his part that he exercised any control over the motor carriers for whom he solicited; Fornaciari, at least, hauled freight that Taylor did not solicit and on which freight Fornaciari paid no commission to Taylor. The drivers of the vehicles picked

[6] I. A. Taylor's operations between Denver and Seattle are covered by application No. MC-6746, which application was heard recently and will be the subject of a separate report.

up from the shippers the freight solicited by Taylor; they [fol. 28] collected the money due for the freight hauled; and Taylor went to the homes of the carriers at certain intervals to collect the commissions due him from them for solicitation. In short, Taylor's operations may be summed up in his answer to the following question asked him on direct examination by counsel for applicant:

Question: Your operation, insofar as these other trucks [those of Lubetich and Fornaciari] were concerned, was one solely of soliciting freight for them?

Answer: Yes, that is right.

Applicant purchased whatever rights Taylor had to a certificate or permit issuable under No. MC-33581 and in May 1936 began operations primarily between Seattle and Los Angeles. As stated, division 5 approved the transfer on September 17, 1936, but, of course, such transfer was predicated on the theory that Taylor was entitled to rights as a common or contract carrier by motor vehicle as they are the only rights transferable. As Taylor was not operating as either a common carrier or as a contract carrier by motor vehicle between the points covered by this application on June 1, 1935, applicant acquired no rights by its purchase from Taylor. Therefore, if applicant acquired any rights under the act, it would be solely by virtue of the operations of Fornaciari whose rights it acquired in June 1937 and whose operations will be discussed next.

Fornaciari's operations. These operations, commenced in January 1935, were conducted between Seattle and Los Angeles, and involved traffic which was secured partly through Taylor's solicitation. During the period from April 1936 to January 1937 Fornaciari transported from terminal to terminal freight turned over to him by the Tri-State Fast Freight, and at that time the name "Tri-State" was carried on the front of his truck. In January 1937 Fornaciari entered into a lease arrangement with the Tri-[fol. 29] State Motor Lines, Inc.[7], but he denies that the lease was ever valid. Irrespective of its validity, however, not more than one trip was actually made under it. From

[7] The operations of Tri-State Motor Lines, Inc., No. MC-18719, will be the subject of a separate report and will be included in No. MC-18718, Alvin T. Knapp Broker Application.

February to June 1937 Fornaciari also handled traffic originated by Hendricks, whose application has hereinbefore been discussed.

As the condition precedent to the issuance of a certificate or a permit under the "grandfather" clauses of the act is bona fide operation on June 1, 1935, or July 1, 1935, as the case may be, and continuous operation as such since that time, it is, therefore, necessary to determine only whether Fornaciari's operations from February to June 1937 were such as would entitle him to the rights herein sought.

All the traffic handled by Fornaciari during this period was turned over to him and was solicited, by Hendricks. Hendricks also issued the bills covering the transportation, collected the charges therefor, based upon its own tariffs, and paid Fornaciari a certain percentage of the revenue realized on southbound loads and a flat rate on express northbound. Shippers' claims were settled by Hendricks, although the amount was later deducted from that paid Fornaciari. Fornaciari, however, did carry insurance on his truck, maintain a cargo policy, and file reports with the states of California, Oregon, and Washington on the amount of freight hauled by him each month. He also paid those States operating fees based on his portion of the total revenue and purchased from them licenses on his equipment.

From the above facts in respect of Fornaciari's operation, it is evident that our conclusions under No. MC-34383 are also applicable here. During the period of operations for Hendricks, Fornaciari in effect abandoned for the time his own operations as a common carrier and assumed the [fol. 30] position of an owner-operator. B-Line Motor Freight Common Carrier Application, supra. As such operations do not entitle him to the authority sought, it is evident that applicant, as successor in interest to Fornaciari, likewise is not entitled to any rights. Accordingly it is unnecessary to discuss the operations performed by applicant or those performed by Fornaciari prior to February 1937.

Findings

We find in No. MC-68618 that applicant's predecessors in interest were on June 1, 1935, and that applicant or its predecessors continuously since have been, in bona fide

operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of the commodities named, from and to the points, and over the routes described in the appendix attached hereto; that applicant is entitled to a certificate of public convenience and necessity authorizing continuance of such operation; and that in all other respects the application should be denied.

We further find in No. MC-34383 that applicant has not established that on June 1, 1935, or July 1, 1935, as the case may be, his predecessors were and that he or his predecessors since have been in bona fide operation as a common or contract carrier by motor vehicle, in interstate or foreign commerce, of general commodities, between the points, and in the territory included in the application; and that the application should be denied.

We further find in No. MC-8522 that applicant has not established that on June 1, 1935, or July 1, 1935, as the case may be, its predecessors were and that it or its pre-[fol. 31] decessors since have been in bona fide operation as a common or contract carrier by motor vehicle, in interstate or foreign commerce, of general commodities, between the points, and in the territory included in the application; and that the application should be denied.

Upon compliance by applicant in No. MC-68618 with the requirements of sections 215 and 217 of the act, and our rules and regulations thereunder, an appropriate certificate will be issued. An order will be entered denying the applications except to the extent a certificate is granted herein in No. MC-68618.

LEE, Commissioner, dissenting in part:

In general I approve the disposition made of the Hendricks application, and I approve the denial of any rights based on Taylor's alleged operations.

As to the denial of claims based on the operations of Lubetich and Fornaciari, I dissent. There is no question but that these men were engaged in transportation by motor vehicle prior to and since the "grandfather" date. Furnishing transportation was their business. They were real truckers; they sat behind a wheel and not behind a desk. Here they are held to have been neither common nor contract carriers, but are dubbed "owner-operators" because for relatively short periods, long after the effective date of

the act, they hauled freight "loaded" by Hendricks and Tri-State. The only authority relied upon by the majority is the B-Line case, a two-page decision in which the question was not thoroughly explored, and to which I dissented.

Even during those periods when they are said to have acted as "owner-operators", Lubetich and Fornaciari continually maintained their respective State operating author- [fol. 32] ities and themselves bore the cost of insurance, operating expenses, etc. Moreover, Lubetich testifies that during this period he did not confine his operations to traffic secured by Hendricks, but hauled other freight as well. No one contradicts this testimony but the majority's report rejects it wholly because he submitted no documentary evidence in corroboration thereof.

Because Hendricks is held to be a common carrier, Lubetich and Fornaciari, who hauled freight for Hendricks, are now denied any rights whatever. I believe that Congress intended that all "grandfather" carriers for hire should be given operating authority, whether they served the general public or confined their operations to hauling freight furnished by a selected shipper or by another carrier. I think Lubetich and Fornaciari had rights as common or contract carriers by motor vehicle, and that their respective successors are entitled to corresponding operating authority.

[fol. 33] Appendix

1. General commodities, except those of unusual value, explosives, household goods (when transported as a separate and distinct service in connection with so-called "household movings"), commodities in bulk, and commodities requiring special equipment other than refrigeration, from Seattle, Wash., to Los Angeles, Calif., as follows:

From Seattle over U. S. Highway 99 to Portland, Oreg.; from Portland over U. S. Highway 99E to junction with and thence over U. S. Highway 99 to Red Bluff, Calif.; thence over U. S. Highway 99E to Sacramento, Calif.; and thence over U. S. Highway 99 to Los Angeles.

Service from Seattle to all intermediate points in California and the off-route points of San Pedro, Long Beach, Hollywood, Terminal Island, Santa Monica, and Wilmington, Calif.

2. General commodities, with the above-described exceptions, from Los Angeles to Medford and Portland, Oreg., and Seattle, as follows:

From Los Angeles to Seattle over the above-described route.

3. Fruits and vegetables, over irregular routes:

1. From points in California situate south of a line drawn east and west through Merced to points in Washington, movements to points east of the Cascade Mountains to be in lots of not less than 10,000 lbs.

2. From points in Washington on and south of U. S. Highway 10 from the Washington-Idaho State line to Dryden, and on and east of U. S. Highway 97 from Dryden to the Washington-Oregon State line—to points in California situate south of a line drawn east and west through Merced.

[fol. 34] Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 2nd day of July, A. D. 1940, No. MC-68618, Los Angeles-Seattle Motor Express, Inc., common carrier application, No. MC-34383, Pete Lubetich common carrier application, No. MC-8522, Williams Brothers, Inc., common carrier application.

Investigation of the matters and things involved in these proceedings having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That the application in No. MC-68618, except to the extent granted in said report, be and it is hereby, denied, effective August 20, 1940.

It is further ordered, That the applications in Nos. MC-34383 and MC-8522 be, and they are hereby, denied, effective August 20, 1940.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 35] EXHIBIT B TO COMPLAINT

Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 31st day of December, A. D. 1940.

No. MC-68618

Los Angeles-Seattle Motor Express, Inc., Common Carrier Application

No. MC-34383

Pete Lubetich Common Carrier Application

No. MC-8522

Williams Brothers, Inc., Common Carrier Application Seattle, Washington

Upon further consideration of the record; and good cause appearing:

It is ordered, That the order of this Commission of July 2, 1940, which by its terms denied, in whole or in part, the applications herein, effective August 20, 1940, and which by subsequent orders was modified, insofar as it denied the application in No. MC-34383, to become effective January 4, 1941, be, and it is hereby, further modified to the extent that the denial order, insofar as it denies the application in No. MC-34383, is to become effective January 10, 1941.

It is further ordered, That the effectiveness of said order, insofar as it denied the application in No. MC-68618, which by order entered October 11, 1940, as thereafter modified, was stayed to become effective January 4, 1941, be, and it is hereby, further stayed to become effective January 10, 1941.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 36] EXHIBIT C TO COMPLAINT

Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 16th day of October, A. D. 1937.

No. MC 34383

Application of Pete Lubetich, Doing Business as Pacific Refrigerated Motor Line, Seattle, Washington

After due investigation:

It appearing, That the applicant in accordance with the requirements of Section 206 of the Motor Carrier Act, 1935, including due service, made application for a certificate of public convenience and necessity to operate as a common carrier by motor vehicle as set forth below, and that the said applicant or predecessor in interest was in bona fide operation in such manner on June 1, 1935, and has so operated since that time; and the Commission so finding; therefore,

It is ordered, That upon full compliance by the said applicant, prior to the effective date of this order, with the requirements of Sections 215, 216, and 217 of the said Act, and the rules and regulations prescribed by the Commission thereunder, governing the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer, or other securities or agreements, and governing the construction and filing of common carrier rate publications, a certificate of public convenience and necessity shall be issued to the said applicant on the effective date of this order, or at such later date as the Commission may designate, authorizing him to engage in interstate or foreign commerce, as a common carrier by motor vehicle of the commodities indicated, over the regular route, between fixed termini, and to and from intermediate and off-route points, as specified below:

Commodities generally, except those of unusual value, and except high explosives, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between Seattle, Wash., and Los Angeles, Calif.:

From Seattle over U. S. Highway 99 to Los Angeles, and return over the same route.

Intermediate points: Chehalis, Wash., Portland, Oreg., and Fresno, Calif.

Off-route points: San Francisco, Calif., for the above-specified commodities; and points and places in Fresno, Tulare, Los Angeles, Orange, Riverside, and San Bernardino Counties, Calif., and Pierce, Yakima, and King Counties, Wash., for fruit and vegetables only.

It is further ordered, That in the event said applicant has not complied with said requirements, rules, and regulations on the effective date of this order, or at such later date as the Commission may designate, consideration will be given to the denial of such certificate and the dismissal of the application therefor.

And it is further ordered, That this order shall become effective the 15th day of November, A. D. 1937, unless on the Commission's own motion or for good cause shown by applicant or any other party in interest it is otherwise ordered.

By the Commission, Division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 37] EXHIBIT D TO COMPLAINT

Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 13th day of November, A.D. 1937.

No. MC 34383

Application of Pete Lubetich, Doing Business as Pacific Refrigerated Motor Line, Seattle, Washington

It appearing, That an order having been issued by the Commission as provided by Section 206 of the Motor Carrier Act, 1935, to become effective on the 15th day of November, A. D. 1937, unless on the Commission's own motion or for good cause shown by applicant or any other party in interest it is otherwise ordered.

It further appearing, That a petition having been filed by the applicant showing good cause that the said order should not become effective on the said date,

It is ordered, That the taking effect of the order in the above-entitled matter be, and it is hereby, stayed pending the further action of the Commission.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fols. 38-39] EXHIBIT E TO COMPLAINT

Western Union

MA 440 34 NT Collect 1 Extra-Washington DC 6

Jan 6 PM 8 46

Albert E. Stephan, Northern Life Tower Bldg., Seattle, Wash.

Commission has denied further postponement in EMSEE 34383 and denial order is effective January 10. Any request for further postponement pending court proceeding will be considered only if made by federal judge.

W. Y. Blanning, Director, Bureau of Motor Carriers.

EMSEE 34383 10.

[fol. 40] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

[File endorsement omitted]

No. 314—Civil

PETE LUBETICH, an individual doing business as Pacific Refrigerated Motor Line, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant, and INTERSTATE COMMERCE COMMISSION, Intervening Defendant

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed February 11, 1941

Comes now the Interstate Commerce Commission (hereinafter called the Commission) and, pursuant to leave of Court under Sections 212 and 213 of the Judicial Code

(U. S. C. Title 28, Sec. 45a), intervenes as a party defendant in the above-entitled cause, and for its answer to the complaint herein says:

I

Answering paragraphs I and II of the complaint, the Commission admits that the plaintiff is an individual doing business as Pacific Refrigerated Motor Line, with his principal place of business in Seattle, Wash.; that in so far as [fol. 41] plaintiff's business is that of a common carrier by motor vehicle, he is subject to regulation by the Interstate Commerce Commission; that this suit has been brought by the plaintiff under an act of Congress approved October 22, 1913, known as the "Urgent Deficiency Appropriations Act", 38 Stat. L. 219, to enjoin and set aside a certain order of the Commission; the Commission further admits and alleges that on July 2, 1940, the Commission, in a proceeding before it designated MC 34383, Pete Lubetich Common Carrier Application, made its report and order denying the application of said Pete Lubetich, plaintiff herein; that a true copy of said report and order of July 2, 1940, is appended to the complaint herein as Exhibit A; that said order is officially reported (along with certain other reports of the Commission) under the title of Los Angeles-Seattle Motor Inc. Common Carrier Application, 24 M. C. C. 141, the Commission's report relative to the Lubetich proceeding aforesaid beginning on page 147; that by successive orders the Commission has postponed the effective date of said order to March 11, 1941; and the Commission denies each of and all the other allegations of said paragraphs I and II.

II

Answering paragraph III of the complaint, the Commission admits and alleges that on or about February 5, 1936, John and Pete Lubetich, a co-partnership, filed with the Commission their application under the so-called "grandfather" exception contained in Section 206 of the Motor Carrier Act, 1935, wherein they sought a "grandfather" certificate of public convenience and necessity which would [fol. 42] authorize transportation by them as common carriers of general commodities, between Seattle, Wash., and Los Angeles, Calif., over certain designated highways and

to certain off-route points in said application stated; that said application was filed on the Commission's form BMC 1, prescribed by it for application for certificates under the "grandfather" clause of Section 206 of said Motor Carrier Act, wherein such certificates were claimed by applicants upon the ground of bona fide operations on June 1, 1935, for common carriers, and continuously thereafter; that protests were filed with the Commission by and on behalf of divers competing carriers opposing the issuance of the certificate prayed in said application; that on or about June 5, 1937, the Commission approved of a sale by John and Pete Lubetich to Pete Lubetich, doing business as Pacific Refrigerated Motor Line, and that thereafter said proceeding was designated by the Commission as the application of said purchaser; that in accordance with law said application was by the Commission referred to Joint Board No. 5 for hearing; that said application came on for hearing before said Joint Board sitting at Seattle, Wash., on September 29 and 30, 1938; that at said hearing the plaintiff, the protestants and numerous other interested parties appeared and a large amount of testimony and other evidence was offered on behalf of the parties, including evidence on behalf of the plaintiff; that said evidence was all addressed to the issue of bona fide operation by the plaintiff and his predecessor on June 1, 1935, and thereafter; that written briefs were filed with the said Joint Board on behalf of the plaintiff and also on behalf of divers protestants, and the Joint Board, on or about August 25, 1939, issued its recom-[fol. 43] mended report and order; that exceptions were filed with the Commission by and on behalf of the plaintiff to said recommended report and order, together with briefs on behalf of the plaintiff supporting his said exceptions; that the protestants aforesaid filed reply briefs opposing said exceptions.

The Commission further admits and alleges that in the course of said proceedings aforesaid the plaintiff and all other parties to said proceeding were, and that each of them was, afforded the full hearing provided for in and by the Interstate Commerce Act; that after said matters had been fully argued and submitted to the Commission as aforesaid for determination, the Commission, by its Division 5, determined said matters and entered and duly served upon the plaintiff and all other interested parties its said report and order of July 2, 1940, which said report and

order include the Commission's findings of fact, decision, conclusions, orders and requirements in the premises, and that upon the evidence taken before the Joint Board as aforesaid, as shown in and by said report, the Commission made the findings and stated the conclusions upon which said report and order are based.

The Commission further alleges and shows that the findings and conclusions set forth in said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted in the proceeding; that in making its report and order the Commission considered and weighed carefully, in the light of its own knowledge and experience each fact, circumstance and condition developed in said hearing on behalf of the parties to said proceeding, [fol. 44] including matters covered by the allegations of the complaint herein; that said order of July 2, 1940, was not made either arbitrarily or contrary to the relevant evidence, or without evidence to support it; and that the Commission, in making said order, did not exceed its authority duly conferred upon it by law, and the Commission denies each of and all the allegations to the contrary contained in said paragraph.

III

Answering paragraphs IV and V of the complaint, the Commission admits and alleges that on or about September 15, 1939, plaintiff filed with the Commission another application for a certificate of convenience and necessity based upon the provisions of Section 207a of the Motor Carrier Act, upon form BMC 8, which form had been designated by the Commission to be used in applications for certificates of convenience and necessity based upon factual public convenience and necessity as described in Section 207a of the Act; that the Commission designated said BMC 8 application as MC-34383 (Sub. No. 1) and assigned the matter for hearing before a Joint Board at Seattle, Wash., on January 30, 1941, and at Los Angeles, Calif., March 19 and 20, 1940; that upon said dates hearings were duly held and the evidence received at said hearings has been duly submitted to said Joint Board for its consideration and the formulation of a recommended report to be submitted to the Commission; that said proceeding is now in process of determination, although no report and order have as yet been made

by the Commission therein, and except as hereinabove admitted, the Commission denies each of and all the allegations in said paragraphs IV and V contained.

[fol. 45] IV

Answering the allegations of paragraph VI of the complaint, the Commission admits the allegations therein contained, except that the Commission denies that said paragraph contains a full, true or correct statement of the contents of the successive petitions presented by the plaintiff to the Commission seeking extension of the effective date of the Commission's report and order of July 2, 1940.

V

Answering the allegations of paragraphs VII, VIII and IX of the complaint, the Commission admits that its said order of July 2, 1940, denies plaintiff's application for a "grandfather" certificate, and the Commission further alleges and shows that Section 206 of the Motor Carrier Act authorized the continuance of the operations of an applicant for a "grandfather" certificate only while said application is pending, and admits that by operation of law the further continuance by plaintiff of the operations carried on by him will become illegal when said application is no longer pending, that is to say, when said report and order of July 2, 1940, have become effective, the pendency of plaintiff's BMC 8 application notwithstanding; the Commission further alleges and shows that any loss or damage to which plaintiff might be subjected upon the Commission's said order becoming final and said proceeding no longer pending would result from operation of law and not from any order made or entered by the Commission; and the Commission denies each of and all the other allegations in said paragraphs contained.

[fol. 46] VI

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the complaint, in so far as they conflict either with the allegations herein or with the statements contained in the Commission's said report of July 2, 1940.

Wherefore, the Commission prays that said complaint be dismissed.

Interstate Commerce Commission, by Nelson Thomas, Attorney, 3328 Interstate Commerce Bldg., Washington, D. C. Daniel W. Knowlton, Chief Counsel, of Counsel.

[fol. 47] *Duly sworn to by John L. Rogers, jurat omitted in printing.*

[fol. 48] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed Feb. 18, 1941

The defendant, United States of America:

1. Admits the allegations of paragraph I to the first semicolon; denies the remaining allegations.

2. Admits the allegations of paragraphs II, III, IV, V and VI.

3. Denies the allegations of paragraph VIII.

4. Answering paragraphs VII and VIII, admits that when the Interstate Commerce Commission's order of July 2, 1940 becomes effective, plaintiff's operations will be in violation of the Motor Carrier Act of 1935 unless he has at that time obtained a certificate of public convenience and necessity from the Commission; is without knowledge and information sufficient to form a belief as to the truth of the allegations relating to injury and damage but alleges that any such injury or damage will result from operation [fol. 49] of law and not from any unlawful act of the Commission.

Frank Coleman, Special Assistant to the Attorney General, Department of Justice, Washington, D. C., Counsel for the United States.

Thurman Arnold, Assistant Attorney General; J. Charles Dennis, Esq., United States Attorney.

I certify that a true copy of the foregoing Answer of the United States of America was this day mailed to the following persons:

Albert E. Stephan, Esq., Northern Life Tower Building, Seattle, Washington, Counsel for Plaintiff. Nelson Thomas, Esq., Washington, D. C., Counsel for Interstate Commerce Commission.

Frank Coleman, Special Assistant to the Attorney General, Department of Justice, Washington, D. C., Counsel for the United States.

February 8, 1941.

[fol. 50] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FIRST SUPPLEMENTAL COMPLAINT—Filed April 4, 1941

Comes now the plaintiff above named and respectfully shows:

I

That this suit was brought to set aside and enjoin enforcement of an order of the Interstate Commerce Commission dated July 2, 1940, entered in cause entitled MC 34383, Pete Lubetich Common Carrier Application, as amended and supplemented by a further order of the Commission entered in the same cause on December 31, 1940, copies of said orders being attached as Exhibit "A" and Exhibit "B" respectively to the original petition filed in this cause on January 8, 1941.

II

That on February 4, 1941, said Interstate Commerce Commission, without taking any further evidence in its said cause MC 34383, entered therein a further order which, omitting formal parts, was as follows:

"*It is ordered*, That the order of this Commission of July 2, 1940, which by its terms as thereafter modified denied the [fol. 51] application. In No. MC-68618 effective January

10, 1941, be, and it is hereby, stayed and suspended to the extent that the denial of the application in No. MC-68618 shall be effective March 11, 1941."

III

That on February 18, 1941, said Interstate Commerce Commission without taking any further evidence in its said cause, MC 34383, entered a further order, which, omitting formal parts, was as follows:

"*It is ordered*, That the order of this Commission of July 2, 1940, which by its terms denied, in whole or in part, the applications herein, effective August 20, 1940, and which by subsequent orders was modified to the extent that the application in No. MC 34383 is to become effective March 11, 1941, be, and it is hereby, modified to the extent that the denial order insofar as it denies the application in No. MC 34383 shall become effective May 12, 1941."

IV

That none of said orders of the Interstate Commerce Commission entered subsequent to the entry of said original order of July 2, 1940, modified said original order in any respect except by postponing the date on which plaintiff is required by said original order to cease the operations described in paragraph I of the original complaint herein; and that the matters complained of by complainant in his original petition herein are not changed or affected in any respect by any of said orders entered by said Interstate Commerce Commission subsequent to July 2, 1940.

V

That subsequent to the filing of the original complaint, to-wit, on February 18, 1941, there was served on plaintiff the recommended report and order proposed by Joint Board [fol. 52] No. 5 in the Commission's Docket No. MC 34383 (Sub. No. 1) to which reference is made in paragraphs V and VI of the original complaint; that by a letter dated March 6, 1941, the Commission has extended until April 15, 1941, the date for filing exceptions to said proposed report and order; that exceptions are now being prepared by applicant and will be forwarded to the Commission by April 15, 1941, together with a request for oral argument in said

case; that said matter will not be finally decided by the Interstate Commerce Commission until an unknown date subsequent to April 15, 1941.

VI

That further particularizing the allegation of unlawful action by the Commission, as set forth in paragraph VIII (1) of said original complaint, complainant specifically alleges that the Commission's decision in its Docket MC 34383, Pete Lubetich Common Carrier Application was contrary to law in that it denied to complainant rights to continue operations as a common carrier by motor vehicle upon the erroneous theory that because it found that he was for a period of time a so-called "owner-operator" that therefore he had lost rights to operate as a common carrier by motor vehicle.

Wherefore, Plaintiff reiterates the prayer of his original complaint herein and prays that same be extended so as to apply to each and all of the orders of the Interstate Commerce Commission mentioned in said First Supplemental Complaint, as well as to the further matters set forth in paragraphs V and VI above.

Albert E. Stephan, Preston, Thorgrimson, Turner, Horowitz and Stephan, Northern Life Tower, Seattle, Attorneys for Plaintiff.

[fols. 53-392] *Duly sworn to by Albert E. Stephan, jurat omitted in printing.*

[fol. 393] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION—Filed June 10, 1941

Before Haney, Circuit Judge, and Bowen and Black, District Judges

BLACK, District Judge:

In plaintiff's action, as set forth in his complaint and supplemental complaint, plaintiff sought to set aside an order of the Interstate Commerce Commission denying

him a "grandfather" certificate authorizing common carrier operation between points in California, Oregon and Washington upon the contention that on and prior to June, 1935 and continuously thereafter he has been engaged in a bona fide common carrier operation, and further sought in the event such "grandfather" application should be denied to have this Court require the effective date of such denial order to be deferred until the Commission shall dispose of plaintiff's BMC 8 application for a certificate of public use and necessity, which last application was filed about three years after the "grandfather" application was made. [fol. 394] The Commission's order denying the "grandfather" application was issued July 2, 1940 in a proceeding entitled "Pete Lubetich Common Carrier Application 24 Motor Carrier Cases 141 (the portion of the printed report referring to the Lubetich application beginning on page 147)". The first effective date of such denial order was August 10, 1940 but such effective date, at the request of plaintiff, was continued from time to time to January 10, 1941. The Commission shortly before January 10, 1941 advised that it would be willing, at the request of the Court, to further extend the effective date of the order, which upon such Court request it has extended until June 15, 1941, so as to permit the hearing before this three-judge Court prior to the final effective date.

Such consideration by the Commission is substantial evidence that it has not been arbitrary towards plaintiff, as plaintiff contends.

The evidence presented to the Commission consisted of both oral testimony and a large quantity of exhibits. Plaintiff has introduced before us a transcript of the oral testimony but such transcript failed to include the exhibits. Such exhibits are an important part of the evidence.

The plaintiff acknowledges that the failure to produce all of the evidence before the Court has heretofore been held a bar to the Court's passing upon any contention that the findings of the Commission are contrary to the evidence.

Unquestionably without bringing before the Court all the evidence considered by the Commission the plaintiff cannot question the facts found by the Commission.

[fol. 395] Tagg Bros. v. United States, 280 U. S. 420, 443-444;

Mississippi Valley Barge Line Co. v. United States, 292 U. S. 282, 285-286.

In connection, therefore, with plaintiff's attempt to set aside the order denying plaintiff the "grandfather" certificate as a common carrier, the Court is only entitled to consider whether or not the ruling of the Commission was supported by the findings as made by it.

The plaintiff chiefly relies upon this phase of the case upon the decision in N. E. Rosenblum Truck Lines v. United States, (D. C. Mo.) 36 F. Supp. 467, in which a similar Court to this one held that that plaintiff was entitled to a "grandfather" permit as a contract carrier. Plaintiff's complaint and supplemental complaint are based entirely upon the contention that the Commission was in error in denying him rights as a "common carrier". Plaintiff in such pleadings only asked that the Commission's order should be suspended or set aside "insofar as same requires plaintiff to cease his operations as a common carrier * * *." Such in any event distinguishes the Rosenblum case, supra.

Included in the findings of the Commission 24 M. C. C., 141 at pages 147-150, we find the following:

"The operations which applicant seeks authority to continue were commenced on March 15, 1935, and were conducted over a regular route between Los Angeles and Seattle, and also over certain irregular routes. Between June 1935 and January 1938, most, if not all, of the traffic handled by applicant or his predecessors was solicited and billed by other motor carriers, and was transported in applicant's vehicles only between the terminals of the other [fol. 396] carriers. In January 1938 applicant engaged a solicitor of his own, established terminals, and apparently discontinued the operations previously conducted in connection with these other carriers. He now operates eight pieces of equipment, of which he owns only two. * * *

"As hereinbefore stated, most, if not all, of the traffic handled by applicant or his predecessors was solicited and billed by other motor carriers. Prior to January 1938, applicant operated two trucks. * * *

"During the period from April 1937 until January 1938, at least, every shipment listed in applicant's exhibit purporting to prove operations was transported by applicant for Hendricks." (Referring to Hendricks Refrigerated Truck Lines, Inc., the operations of which are described in said same report under No. MC-68618.) "In such instances the bills of lading were issued by Hendricks, and Hendricks employed applicant to transport the goods. * * * The

tariff rates applied were those of Hendricks. * * * in fact, the evidence shows that at least during the period from April 1937 until January 1938 the only freight transported in applicant's equipment was for Hendricks, a common carrier by motor vehicle."

Although the plaintiff appears to have been a common carrier from January, 1938 to the time of the hearing, such findings of the Commission certainly support the conclusion that the plaintiff was not at all times from before the critical date of June 1, 1935 to January, 1938 a common carrier. Under the authority of United States v. Maher, 307 U. S., 148, 155, it was necessary that plaintiff should be such from June 1, 1935 to the date "when the Commission passed upon the application" for a certificate under the "grandfather" clause.

Clearly, on the record before this Court, we have no authority to disturb the denial by the Commission of certificate to plaintiff under the "grandfather" clause.

[fol. 397] The alternative contention of plaintiff is that the Court should compel deferment of the effective date of such order of denial until the BMC 8 application is passed upon.

Plaintiff's two applications constitute two separate proceedings, one of which has been finally disposed of—the other is awaiting future decision. We cannot accept plaintiff's suggestion that a BMC 8 proceeding, which plaintiff delayed instituting until three years after his application under the "grandfather" clause was made and which, in fact, was not instituted until less than ten months before the decision denying his earlier application, can be welded to and made a part of the "grandfather" proceeding so as to prevent final action upon the "grandfather" proceeding until the BMC 8 proceeding is ultimately disposed of. Under the Interstate Commerce Act the Commission is granted power to determine when its orders shall become effective. Since it had the authority to deny the "grandfather" application it could say when that order should be effective. The Supreme Court in United States, et al. v. Baltimore & Ohio R. Co., et al., 284 U. S. 195, said:

" 'Orders (referring to those of the Interstate Commerce Commission) * * * shall take effect * * * according as shall be prescribed in the order.' The courts may not usurp the function of the Commission and say one

of its orders shall become effective thirty days, a hundred days, or at any other time after entry. An order must take effect as prescribed; its effective date, if any, is the one actually appointed, not one which might have been."

Also see Philadelphia-Detroit Lines, Inc. v. United States, 31 F. Supp. 188. This last case upon appeal was affirmed [fol. 398] per curiam by the Supreme Court, 308 U. S. 528.

As in that case, we hold that the Commission's action in this instant case was "a valid exercise by the Commission of its discretionary powers of which no abuse appears".

To sustain plaintiff's contention upon the second phase of the case before us would give precedent for untoward results that would completely dwarf the injury plaintiff complains of.

The logic of the situation refutes plaintiff's contention. It was plainly the Congressional intent to permit operation during the pendency only of a "grandfather" application. An applicant for a BMC 8 certificate is accorded no such privilege. If it is advisable that BMC 8 applicants ought also to have the privilege of operation while awaiting decision from the Commission the request for such should be made to Congress and not to the Court.

Plaintiff's action is dismissed.

Lloyd L. Black, District Judge.

We concur. Bert Emory Haney, Circuit Judge. John C. Bowen, District Judge.

[fol. 399] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed July 8, 1941

In the above-entitled cause the Court makes the following findings of fact:

1. The plaintiff, Pete Lubetich, an individual doing business as Pacific Refrigerated Motor Line, has brought this suit under the Act of Congress approved August 9, 1935, and amendments thereto, and the Urgent Deficiencies Act of October 22, 1913, to set aside an order of the Interstate

Commerce Commission as hereinafter described, which denies an application made by said plaintiff for a certificate or a permit under the "grandfather" provision of Section 206(a) and 209(a) of the Motor Carrier Act authorizing certain operations by him as a common or contract carrier by motor vehicle. The complaint further prays that in the event the Court should find that the Commission's order [fol. 400] denying said "grandfather" application should not be set aside and annulled, the Court should require the Commission to postpone the effective date of said denial order until the Commission should have disposed of another application made by plaintiff seeking a certificate for substantially the same operations under Section 207 of the Motor Carrier Act upon proof of factual convenience and necessity.

2. The plaintiff, on or about February 5, 1936, filed his "grandfather" application above referred to with the Commission wherein he sought a certificate of public convenience and necessity or in the alternative a permit authorizing operations as a common carrier or in the alternative as a contract carrier by motor vehicle of general commodities in interstate or foreign commerce between points in California, Oregon and Washington over irregular routes and also over certain regular routes.

3. Certain competing carriers operating in and through the territory involved intervened in the Commission proceeding and filed their protests opposing plaintiff's application.

4. The said proceeding was designated by the Commission as No. MC 34383, Pete Lubetich Common Carrier Application, and was set down for hearing and the receiving of evidence before a joint board as required by statute and came before the Commission upon exceptions from a recommended report of said joint board.

5. At said hearing before the joint board the plaintiff introduced a large amount of evidence and argued fully the facts and the law considered pertinent to his application.

6. The Commission on July 2, 1940, made its report and order in said proceeding, its report being printed in 24 M.C.C. 141, the portion referring to the Lubetich applica- [fol. 401] tion beginning on page 147. In said report the

Commission found that the evidence failed to show that Lubetich or his predecessor on June 1, 1935, and thereafter, had been in bona fide operation as a common or contract carrier by motor vehicle in interstate or foreign commerce of general commodities between the points and in the territory included in the application, and the Commission thereupon entered an order denying the plaintiff's said application.

7. The record in this Court does not contain all the evidence received and considered by the Commission and the Court has, therefore, considered plaintiff's suit upon the facts stated in the Commission's report.

8. On September 15, 1939, plaintiff filed with the Commission another application for a certificate which would authorize substantially the same operations as those described in his "grandfather" application. This application was filed under the provisions of Section 207 of the Motor Carrier Act and was based upon allegation and proof of factual convenience and necessity. A hearing has been had upon said application, evidence taken, and said application is now under consideration by the Commission and has not as yet been acted upon.

9. The plaintiff duly applied to the Commission for a reconsideration of its report and order and the Commission has denied the same.

Conclusions of Law

The Court makes the following conclusions of law:

1. The Commission's report and order of July 2, 1940, and its denial of plaintiff's application for a "grandfather" certificate or permit as prayed in its application to the [fol. 402] Commission and as stated in plaintiff's complaint herein were justified and constitute a valid exercise of the Commission's powers under the Motor Carrier Act of 1935.

2. The findings set forth in the Commission's report, considered as a whole, are sufficient to sustain and justify the order made by the Commission denying plaintiff's application for a "grandfather" certificate, or permit.

3. The action of the Commission upon plaintiff's application was a valid exercise of the Commission's legal powers and in the absence of the introduction by plaintiff in

evidence before this Court of all the evidence received and considered by the Commission, the statements and findings of fact set out in the Commission's report must, for the purposes of this suit, be considered as supported by substantial evidence.

4. The construction of law applied by the Commission in its report and order was and is correct.

5. The pendency of the plaintiff's application for a certificate under Section 207 of the Motor Carrier Act does not afford any ground for this Court suspending the force and effect of the Commission's order of July 2, 1940, upon the plaintiff's "grandfather" application until the determination of his other application.

6. The relief which plaintiff prays should be denied and its suit dismissed for want of equity.

Bert Emory Haney, United States Circuit Judge.
John C. Bowen, United States District Judge.
Lloyd L. Black, United States District Judge.

July 8, 1941.

[fols. 403-405] [File endorsement omitted]

In United States District Court

No. 314. Civil

Pete Lubetich, an Individual Doing Business as Pacific Refrigerated Motor Line, Plaintiff,

vs.

United States of America, Defendant,

and

Interstate Commerce Commission, Intervening Defendant

Decree—Filed July 8, 1941

In this suit brought under 28 U. S. C. A. 41 (28) to enjoin and set aside an order of the Interstate Commerce Commission, a court of three judges having been convened

pursuant to the law in such case made and provided, the cause having been submitted for hearing upon final decree, and the Court having filed its opinion, findings of fact and conclusions of law, all of which are by reference made a part hereof: Now, therefore, for the reasons set forth in said opinion, findings and conclusions,

It is Ordered, Adjudged and Decreed that the plaintiff's suit be dismissed for want of equity.

Bert Emory Haney, United States Circuit Judge.
John C. Bowen, United States District Judge.
Lloyd L. Black, United States District Judge.

July 8, 1941.

[fol. 406] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 9, 1941

Now comes Pete Lubetich, an individual doing business as Pacific Refrigerated Motor Line, plaintiff in the above entitled cause, by his counsel, and in connection with his appeal files the following assignments of error upon which he will rely in prosecution of his appeal to the Supreme Court of the United States from the final decree of this court entered July 8, 1941.

The District Court erred:

(1) In dismissing plaintiff's complaint and in declining to enter a decree setting aside and annulling the order of the Interstate Commerce Commission complained of, upon the ground stated in his said complaint as amended.

(2) In holding that the Commission's action in postponing, at the request of this court, the effective date of the order therein attacked, in order to permit the hearing before the three judge court prior to the final effective date, was substantial evidence that the Commission had not been arbitrary in its determination of plaintiff's applications.

(3) In holding that the decision of the United States [fol. 407] District Court for Missouri, reported as Rosenblum Truck Lines v. United States, 36 Fed. Supp. 467, was distinguishable on the ground that in the instant case plaintiff sought suspension of the Commission's order "insofar as same requires plaintiff to cease his operations as a common carrier * * *".

(4) In holding that it was necessary for plaintiff to be a common carrier from June 1, 1935, to the date "when the Commission passed upon the application."

(5) In failing to find that plaintiff sought authority before the Interstate Commerce Commission for a certificate as a common carrier or in the alternative for a permit as a contract carrier.

(6) In finding that this court should not compel deferment of the effective date of the "grandfather" application until the public convenience and necessity application (BMC 8 Application) is passed upon.

(7) In holding that the Commission's action in failing to defer the effective date of its order in the "grandfather" application while there was still pending before it a public convenience and necessity application was "a valid exercise by the Commission of its discretionary powers of which no abuse appears."

(8) In holding that it was plainly the congressional intent to permit operation under such circumstances as are shown in the instant case "during the pendency only of a 'grandfather' application."

(9) In sustaining and approving the order of the Commission complained of.

Wherefore, on account of the errors hereinbefore as- [fol. 408] signed, plaintiff prays that the said final decree of the District Court of the United States for the Western District of Washington, Northern Division, entered July 8, 1941, be reversed, and a decree rendered in favor of the plaintiff, setting aside and annulling said report and order of the Interstate Commerce Commission, dated July 2, 1940,

(subsequently presently extended to June 15, 1941) and herein complained of.

Preston, Thorgrimson, Turner, Horowitz & Stephan.
By Albert E. Stephan, Counsel for Pete Lubetich, an individual doing business as Pacific Refrigerated Motor Line.

[fols. 409-421] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 9, 1941

In the above entitled cause Pete Lubetich, an individual doing business as Pacific Refrigerated Motor Line, plaintiff, having made and filed his petition praying an appeal to the Supreme Court of the United States from the final decree of this court in this cause entered July 8, 1941, and having also made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of the court in such cases made and provided, it is

Ordered and Decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within sixty (60) days from the date hereof, and the clerk is directed to transmit forthwith to the United States Supreme Court a properly authenticated transcript of the record, proceedings and papers on which the final decree was made and entered.

It is further ordered that said plaintiff shall give a good and sufficient cost bond on such appeal in the sum of five hundred Dollars ($500.00) conditioned as required by law.

Dated July 9, 1941.

Presented to Hon. Lloyd L. Black, By Albert E. Stephan. Lloyd L. Black, U. S. District Judge.

[fol. 423] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed July 10, 1941

To the United States of America and the Interstate Commerce Commission:

Pursuant to the Urgent Deficiencies Appropriations Act of October 22, 1913, 38 Stat. 208, 221, you are hereby notified that the plaintiff Pete Lubetich, an individual doing business as Pacific Refrigerated Motor Line, has taken

an appeal to the Supreme Court of the United States from the final decree entered by the District Court on July 8, 1941 in the above entitled cause, and the citation makes the appeal returnable within sixty (60) days from the date thereof.

Dated, July 10, 1941.

Preston, Thorgrimson, Turner, Horowitz & Stephan. By Albert E. Stephan, Attorneys for Pete Lubetich, an individual doing business as Pacific Refrigerated Motor Line.

[File endorsement omitted.]

[fol. 424-431] In United States District Court

[Title omitted]

Order to Transmit Original Record—Filed July 15, 1941

Pursuant to the provisions of the Act of October 22, 1913, C. 32, 38 Stat. 220, 28 U. S. C. A., Sec. 47a, providing that the District Court may direct the original record instead of a transcript thereof to be transmitted upon appeal to the Supreme Court of the United States:

It is Ordered that the original record filed in this Court in the above entitled cause, as designated in the Praecipe of counsel, be transmitted by the Clerk of this Court to the Clerk of the Supreme Court of the United States within five (5) days from the date of filing of said Praecipe.

Dated this 15th day of July, 1941.

Lloyd L. Black, United States District Judge. Presented by Albert E. Stephan.

[File endorsement omitted.]

[fol. 432] [File endorsement omitted]

[Title omitted]

In United States District Court

Condensed Statement of Proceedings at Hearing Before District Court—Filed July 22, 1941

This cause came on for hearing on Plaintiff's application for an injunction on April 14, 1941, before Circuit Judge

Bert Emory Haney and District Judges John C. Bowen and Lloyd L. Black.

Plaintiff appeared by his attorneys, Preston, Thorgrimson, Turner, Horowitz and Stephan, and Albert E. Stephan.

Defendant, the United States of America, appeared by its attorney, Frank Coleman, and Gerald Shucklin, Assistant United States Attorney.

Intervenor, Interstate Commerce Commission appeared by its attorney, Nelson Thomas.

On behalf of plaintiff, there were offered and received in evidence the following exhibits:

Exhibit 1—Report and Order of the Interstate Commerce Commission, decided July 2, 1940, 24 MCC 141, together with order of like date denying application of plaintiff.

Exhibit 2—Order of the Interstate Commerce Commission granting a compliance authorization to Pete Lubetich, dated October 16, 1937, and a subsequent order staying the compliance authorization, dated November 13, 1937.

Exhibit 3—Petition of Pete Lubetich to the Interstate Commerce Commission, dated December 17, 1940.

[fol. 433] Exhibit 4—Copy of a proposed report of joint board No. 5 of the Interstate Commerce Commission, dated February 18, 1941.

Exhibit 5—Exceptions to the proposed report of February 18, 1941.

Exhibit 6—Transcript of the record of hearing before the Interstate Commerce Commission, Docket No. MC 34383, Pete Lubetich Common Carrier Application.

On behalf of defendant, there were offered and received in evidence the following exhibits:

Exhibit A-1—Copy of Interstate Commerce Commission Form BMC 1.

Exhibit A-2—Copy of Interstate Commerce Commission Form BMC 8.

Counsel for the respective parties argued the case orally to the Court and were granted leave to file briefs, and briefs were filed. Thereupon, the Court took the case under advisement. Thereafter, on June 10, 1941, the court filed its opinion and thereafter entered the subsequent findings, conclusions, decree and orders as set forth in the record for which a praecipe is requested.

On July 8, 1941, the court convened to hear plaintiff's application for a stay pending final determination by the Supreme Court of the United States. It declined to grant such a stay and referred this matter, pursuant to the provisions of law, to a Justice of the Supreme Court of the United States.

The foregoing condensed statement of the proceedings and evidence at the hearing of this cause before the District Court is hereby tende-d, pursuant to the rules of the Supreme Court of the United States.

Preston, Thorgrimson, Turner, Horowitz & Stephan, by Albert E. Stephan, 2000 Northern Life Tower, Seattle, Washington, Attorney for Plaintiff.

July 22, 1941.

[fols. 433½-435½] Receipt of a copy of the foregoing condensed statement of the proceedings before the District Court is hereby acknowledged.

Frank Coleman, Assistant to the Attorney General of the United States and Attorney for defendant, the United States of America. Nelson Thomas, Attorney for Intervening Defendant, Interstate Commerce Commission. J. Charles Dennis, United States Attorney for the Western District of Washington, by Gerald Shucklin, Assistant United States Attorney.

[fol. 436] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE FOR ORIGINAL RECORD—Filed July 19, 1941

Pursuant to the order of the United States District Court in the above entitled cause, entered July 15, 1941, directing that the original record as designated in the Praecipe of Counsel, be transmitted on appeal as provided in the act of October 22, 1913 c. 32; 38 Stat. 220; Title 28, U.S.C.A. Sec. 47a, please transmit within five (5) days to the Clerk of the Supreme Court of the United States the original record in the above entitled cause for the purpose of the

Appeal heretofore filed and allowed, including the following original papers and documents, to-wit:

1. Plaintiff's Complaint and Exhibits A, B, C, D and E thereto attached, filed January 8, 1941.

2. Motion of Interstate Commerce Commission for Leave to Intervene and Answer of Interstate Commerce Commission, filed February 11, 1941.

3. Answer of the United States of America, filed February 18, 1941.

4. Plaintiff's First Supplemental Complaint, filed April 4, 1941.

5. Order Granting Leave to File First Supplemental Complaint, filed April 4, 1941.

[Vol. 437] 6. Order Setting Cause for Hearing upon Petitioner's Application, filed April 4, 1941.

7. The Exhibits offered in Evidence at the hearing before the 3-Judge Court on April 14, 1941, as follows:

A. Plaintiff's Exhibit 1, Report and Order of the Interstate Commerce Commission, decided July 2, 1940, 24 MCC 141, together with order of like date denying application of plaintiff.

B. Plaintiff's Exhibit 2, being Order of the Interstate Commerce Commission granting a Compliance Authorization to Pete Lubetich, dated October 16, 1937, and a subsequent Order Staying the Compliance Authorization, dated November 13, 1937.

C. Plaintiff's Exhibit 3, being a Petition of Pete Lubetich to the Interstate Commerce Commission, dated December 17, 1940.

D. Plaintiff's Exhibit 4, being a copy of a Proposed Report of Joint Board No. 5 of the Interstate Commerce Commission, dated February 18, 1941.

(Note to Clerk: Unverified copies of Exhibits 3 and 4 were received at the hearing, subject to subsequent certification. By my letter of April 23, 1941, I transmitted to you the original certified copies to be substituted for the unverified copies originally received.)

E. Plaintiff's Exhibit 5, being his Exceptions to the Proposed Report of February 18, 1941.

F. Plaintiff's Exhibit 6, being a Transcript of the Record of Hearing before the Interstate Commerce Commission in

Docket No. MC. 34383, Pete Lubetich Common Carrier Application.

G. Defendant's Exhibit A-1, being a copy of Interstate Commerce Commission Form BMC 1.

H. Defendant's Exhibit A-2, being a copy of Interstate Commerce Commission Form BMC 8.

8. Opinion of the Court, filed June 10, 1941.

9. Findings of Fact and Conclusions of Law, filed July 8, 1941.

10. Final Decree, filed July 8, 1941.

11. Letter from Nelson Thomas, Esq., Attorney for Interstate Commerce Commission to Honorable Lloyd L. Black, United States District Judge, dated July 3, 1941, filed in this Court July 8, 1941.

[fols. 438-440] 12. Petition for Appeal filed July 9, 1941.

13. Assignment of Errors, filed July 9, 1941.

14. Statement as to Jurisdiction, filed July 9, 1941.

15. Order Allowing Appeal, filed July 9, 1941.

16. Bond for Costs on Appeal, filed July 10, 1941.

17. Notice of Appeal, filed July 10, 1941.

18. Copy of Citation on Appeal, filed July 10, 1941.

19. Statement Directing Attention to Rules of Supreme Court and Proof of Service thereof, filed July 10, 1941.

20. Order of the District Court Directing the Clerk of the said Court to Transmit to Clerk of the United States Supreme Court the original record, filed July 15, 1941.

21. Proof of Service on Honorable Francis Biddle, Solicitor General of the United States, filed July 17, 1941.

22. Notice of Appeal directed to the Attorney General of the State of Washington, and Proof of Service thereof filed July 17, 1941.

23. Notice of Appeal directed to the Attorney General of the State of Oregon, and Proof of Service thereof, filed July 17, 1941.

24. Proof of Service on Honorable W. P. Bartel, Secretary of Interstate Commerce Commission, filed July 18, 1941.

25. Condensed Statement of Proceedings at the Hearing before the District Court.

26. All appropriate Docket Entries in their proper order.

27. Praecipe for Transcript of Record.
28. Letter of Nelson Thomas of 7-23-41 re Praecipe.

Preston, Thorgrimson, Turner, Horowitz & Stephan, by Albert E. Stephan, Attorneys for Pete Lubetich, an Individual doing business as Pacific Refrigerated Motor Line.

July 19, 1941.

[fol. 441] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 442] Citation in usual form omitted in printing.

[fol. 443] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS INTENDED TO BE RELIED UPON AND DESIGNATION OF THE RECORD TO BE PRINTED—Filed July 31, 1941

I

Comes now Pete Lubetich, an individual doing business as Pacific Refrigerated Motor Line, appellant, and states that in his brief and oral argument before this Court, on his appeal in the above entitled case, he will rely upon the points set forth in his assignment of errors, numbered 1, 2, 3, 4, 5, and 9.

II

In opinion of counsel for appellant, the points No. 6, 7, and 8 assigned as error in the assignment of errors, filed July 9, 1941, have been rendered moot, by virtue of a decision of the Interstate Commerce Commission, dated July 8, 1941, but not served on appellant until July 17, 1941. Said decision is reported as Interstate Commerce Commission No. MC 34383 (Sub. No. 1) Pete Lubetich Extension of Operations, — MCC — (mimeographed) decided July 8, 1941. It is the decision upon proof of public convenience and necessity to which reference was made in plaintiff's complaint, defendants' answer, and the opinion

of the court, wherein the contention is considered that the Commission committed legal error in denying the "grandfather" application, while the "public convenience and [fol. 444] necessity" application was still pending before it. However, since the Commission has subsequently decided that application, that question raised in the complaint now seems moot.

III

Appellant further states that for the foregoing reasons he will abandon the points heretofore enumerated and designated in the assignment of errors, 6 to 8, inclusive, and that the portion of the record necessary for the consideration of the points set forth above is as follows:

1. Plaintiff's complaint and exhibits A, B, C, D, and E, thereto attached. (Original Record, pp. 2-38.)

2. Answer of Interstate Commerce Commission. (Original Record, pp. 40-46.)

3. Answer of United States of America. (Original Record, pp. 48-49.)

4. Plaintiff's first supplemental complaint. (Original Record, pp. 50-52.)

5. Opinion of the Court. (Original Record, pp. 393-398.)

6. Findings of Fact and Conclusions of Law. (Original Record, pp. 399-402.)

7. Final Decree. (Original Record, p. 403.)

8. Assignment of errors. (Original Record, pp. 406-408.)

9. Jurisdictional statement. (Original Record, pp. 409-413.)

10. Order allowing appeal. (Original Record, p. 420.)

11. Notice of appeal. (Original Record, p. 423.)

12. Statement directing attention to Rule 12(3) and proof of service. (Original Record, p. 424.)

13. Order to transmit original record. (Original Record, p. 425.)

[fols. 445-446] 14. Condensed statement of proceedings before District Court. (Original Record, pp. 432-433.)

15. Certificate of Clerk of U. S. District Court to Record on Appeal. (Original Record, pp. 440-441.)

16. Citation on appeal. (Original Record, p. 442.)

17. Praecipe for original record. (Original Record, pp. 436-438.)

All of the remaining original documents transmitted by the Clerk of the District Court to the Clerk of this Court, in conformity with an order of the District Court, and praecipe of counsel, are not necessary for the consideration of the points intended to be relied upon, and should not be printed by the Clerk of this Court.

Preston, Thorgrimson, Turner, Horowitz & Stephan, by Albert E. Stephan, 2000 Northern Life Tower, Seattle, Washington, Attorney for Plaintiff.

[fol. 447] Service of this "Statement of Points to be relied upon and Designation of the Record to be Printed", is acknowledged this 28th day of July, 1941.

Frank Coleman, Special Assistant to the Attorney General for the United States of America. Nelson Thomas, Attorney, Interstate Commerce Commission, for the Interstate Commerce Commission.

[fol. 448] [File endorsement omitted.]

Endorsed on cover: Enter Albert E. Stephan, File No. 45,650, W. Washington, D. C. U. S. Term No. 322. Pete Lubetich, an Individual Doing Business as Pacific Refrigerated Motor Line, Appellant, vs. The United States of America and Interstate Commerce Commission. Filed July 30, 1941, Term No. 322, O. T., 1941.